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Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

ĐOUGLAS A. BELL AND TAMMY BELL,

Petitioners,

v.

MIKE IRWIN AND STEVEN CROW,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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56 pp

QUESTION PRESENTED FOR REVIEW

Whether the standard for ruling on motions for summary judgment articulated in *Anderson v. Liberty Lobby* applies to the question of objective reasonableness in Fourth Amendment excessive force cases even when there are no disputed material facts to resolve at trial.

PARTIES OF THE CASE

Petitioners - Douglas A. Bell and Tammy Bell

Respondents - Mike Irwin and Steven Crow

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Gilbert, D.J.) granting Respondent's Motion for Summary Judgment (A7)is published at 2002 WL 882959 (S.D.Ill.). The Court of Appeals opinion (per Easter Brook, C.J., joined by Coffee and Kanne, C.J.) affirming (A1) is published at 321 F.3d 637.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and Order on February 25, 2003. Petitioner invokes this Courts jurisdiction under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV. Search and Seizure.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. Section 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance,

regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioners brought this claim under 42 U.S.C. Section 1983 as a result of an incident that occurred on April 2, 1999 when Petitioner Douglas Bell was arrested for disorderly conduct by the Illinois State Police. Petitioners' filed their initial Complaint on March 31, 2000, in the United States District Court for the Southern District of Illinois. Mr. Bell alleges that Respondent Irwin violated Mr. Bell's Fourth Amendment Rights in using excessive force in arresting him. He further claims that Respondent Crow failed to intervene to prevent Irwin's use of excessive force.

Specifically, in the early morning hours of April 2, 1999, in the course of arresting Mr. Bell, Irwin fired four

projectiles from a 12 gauge shotgun at Mr. Bell. The projectiles, less lethal munitions, are sometimes referred to as bean bag rounds because of the fact they have metal pellets encased in a heavy material. All four rounds struck Mr. Bell, the last of which struck him in the head. This round broke upon impact resulting in one or more of the pellets penetrating his skull and causing memory loss.

Respondents filed motions for summary judgment before trial. Judgment disposing of all federal claims was entered pursuant to Order by the District Court on May 3, 2002. (A1).

The district court granted summary judgment on two bases. First, the court found that Irwin's use of force was reasonable. (A20). Judgment was also entered in favor of Respondent Crow because the claim against him was premised on Irwin's unconstitutional use of force. (A23). The district court also granted summary judgment on the issue of qualified immunity. (A24). This appeal followed. The appellate court, in reviewing the district court's decision, did not address the issue of qualified immunity and based it's decision solely on whether Respondent Irwin's conduct was objectively reasonable. (A1). The court decided that there were no issues of material fact for trial and that, therefore, the issue of objective reasonableness was a purely legal question. (A5). The court then concluded that Irwin's use of force was reasonable. Petitioner seeks a writ of certiorari because the appellate court

did not apply the proper standard for determining motions for summary judgment. Petitioner seeks review by this Court and remand to the appellate court with instructions to reevaluate factual circumstances surrounding Irwin's use of force under the proper legal standard.

REASONS WHY WRIT SHOULD BE GRANTED

This Court should grant Petitioner's Writ of Certiorari for three reasons. First, the circuit court's decision conflicts with this Court's decision in *Anderson v. Liberty Lobby,* 477 U.S 242 (1986), and decisions of other circuits. The circuit court failed to apply the correct legal standard, as set forth in *Anderson*, for evaluating whether summary judgment should be granted when a court determines that there are no disputed material facts for the jury to consider at trial. Here, in the context of an excessive force case, the lower court improperly treated the question as a purely legal one, subject solely to the analysis of a three judge panel acting as a surrogate jury. Under the circuit court's reasoning, no deference should be given to the basic rights of the parties to a trial by jury, or the possibility that a reasonable jury may come to a different conclusion after being properly instructed on the law. While a district court's determination may, in some cases, be the same as a jury of twelve reasonable citizens, it just as likely may not be. Although courts have been granted the license, for the purpose of judicial economy, to dispose of cases without a trial, there are specific limitations on this power which are designed to

protect the parties fundamental rights to a trial by jury. The court below's decision usurps that right.

Furthermore, the circuit court's decision on this issue highlights the confused and conflicting manner in which the other circuits have dealt with the same question. Although the Court has made clear the standard for summary judgment in cases where there are no disputed material facts, in the context of excessive force claims, the issue has taken on a life of its own. Some circuits have treated the question of reasonableness in a manner similar to the court below. Other circuits, in giving proper deference to trial by jury, have continued to apply the correct standard for summary judgment this Court articulated in *Anderson*. Still others are somewhere in between. Because the standards which the courts have applied are far from uniform, the Court should take this opportunity to reinvigorate its holding in *Anderson*, and make clear its application to claims of excessive force.

Finally, although the circuit court's affirmance was not based on qualified immunity, the Court should take this opportunity to clearly define how these standards relate to the question of objective reasonableness in that context. In *Saucier v. Katz*, 533 U.S. 194 (2001), the Court evaluated the issue of qualified immunity in excessive force cases. The Court held that the qualified immunity analysis is not identical to the substantive question of objective reasonableness. *Id.* at 201-206. The Court clarified that the objective reasonableness

analysis articulated in *Graham* is only the first step in a two step analysis. *Id.* The court assumed, however, for purposes of its limited review, that a constitutional violation under *Graham* had, in fact, occurred. *Id.* at 207. While the Court did provide some clues as to how the *Graham* analysis should be conducted, it was not explicit since it was not faced wit this question. *Id.* at 201. The Court can now take the opportunity to articulate a universal standard for evaluating objective reasonableness in excessive force cases on summary judgment.

I. The circuit court's decision is in direct conflict with this Court's decision in *Anderson v. Liberty Lobby*.

The circuit court decided, though this is not conceded, that their were no material facts for the jury in this case to decide. The standard for evaluating whether summary judgment should be granted is a clear one. The Court has stated that the standard for summary judgment under Rule 56(c) "mirrors the standard for directed verdict under Federal Rule of Civil Procedure 50(a)." *Anderson,* 477 U.S. at 250. Under that standard, "the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion to the verdict." *Id.* at 250. "If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." *Id.* at 250-51. Ultimately, the question the court must ask is whether "reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Id.* at 252. Thus the proper inquiry must take into consideration any

reasonable inferences a jury might draw and, more importantly, it must allow for the possibility that reasonable jurors, even after being properly instructed on the law, may actually disagree with the conclusion of a single judge, or even a panel of three judges.

The court's opinion below sidesteps the proper application of this standard. Instead of applying the standard to the facts before it, the court merely decided for itself whether it felt that the facts constituted a reasonable application of force by Officer Irwin. (A5). Petitioner acknowledges that their may be instances when it is appropriate for a court to grant summary judgment if there are no material facts in dispute concerning the objective reasonableness of an officer's conduct. Indeed, there are examples of courts that have done just that, while still applying the appropriate standard governing summary judgment. *See Wilson v. Spain,* 209 F.3d 713 (8th Cir. 2000). In this case, however, the court went a step further in holding that, where there are no disputed material facts, the reasonableness of the use of force is a pure "legal issue." (A5).

The circuit court justifies its departure from *Anderson* through reliance on *Graham v. Connor,* 490 U.S. 386 (1989). It correctly identified the substantive test articulated by *Graham* concerning Section 1983 excessive force claims. (A3). That test is one of "objective reasonableness." *Graham,* 490 U.S. at 395 - 98. The court below makes much of the language in *Graham* holding that "the 'reasonableness' of a particular use

of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (A3 *citing Graham,*490 U.S. at 396.) From that language, the court extrapolates that reasonableness is not a question for the jury at all. It stated that allowing a jury to determine "whether particular conduct was reasonable within the meaning of the Fourth Amendment would introduce the *ex post* reassessment that *Graham* decried." (A 4-5)

The import the circuit court's reasoning is clear- when an officer provides an undisputed recitation of facts in order to justify his conduct, the conduct should not be further scrutinized as that would be "second guessing." The logic of this argument is dubious. Whenever a factfinder is charged with evaluating individual conduct, the task itself necessitates an *ex post* reassessment. It is this fundamental truth about the nature of litigation and trial that required the *Graham* Court to specify the manner in which the reassessment should take place - from the perspective of a "reasonable officer on the scene." *Graham,* 490 U.S. at 396. Notably, however, *Graham* does not hold that a factfinder should not reevaluate an officer's conduct. Instead, through the lens of objective reasonableness, *Graham* explicitly makes provision for it.

What *Graham* did not address is equally important for another reason. *Graham* enunciated the proper substantive standard for evaluating objective reasonableness, it did not change the law on who would make that determination. The

focus of *Graham* is on the governing substantive law. It reversed the grant of a directed verdict because the appellate court had reviewed the district court's ruling under an "erroneous view of the governing substantive law." *Graham,* 490 U.S. at 399. Because the lower court in *Graham* did not identify the constitutional provision under which the claim arose, the Court clarified that the source of the right to be free from excessive force during an arrest. It concluded that this right was derived from the Fourth Amendment as opposed to a generic notion of due process. 490 U.S. at 394. The Court reasoned that the nature of the right is properly drawn from the Amendment's text which guarantees citizens the right " to be secure in their persons ... against unreasonable ... seizures." *Id.* Thus, *Graham* informed the courts of the source of the right to be free from excessive force, and the legal contours of that right. *Graham* said nothing which could be construed as recasting the ultimate question, of whether a use of force is reasonable, as a legal one outside the province of the jury.

The circuit court's reasoning not only conflicts with established law, it also employs faulty logic. The holding implies that the only purpose of the jury is to resolve factual disputes and not, after being instructed on the law, to make any determination concerning the ultimate question of liability - whether the officers conduct was objectively reasonable under the circumstances. At the same time, the court acknowledges that "when material facts are in dispute, the case must go to a

jury." (A5).

As further support for this approach, the circuit court relies on two opinions pertaining to probable cause and the voluntariness of a confession in criminal cases. (A-5 *citing Ornelas v. United States,* 517 U.S. 690 (1996) & *Miller v. Fenton*, 474 U.S. 104 (1985)). The court's reliance on these opinions is misplaced. These opinions deal with Fourth and Fourteenth Amendment questions in the context of a criminal case. *Id.* Thus, at issue were questions concerning the admissibility of evidence and the exclusionary rule. Importantly, these purely legal questions are decided by the court, whether or not there are disputed facts. *Id.* If these cases were to somehow apply to excessive force cases brought under Section 1983, then it would follow that the court would make the determination of whether force was objectively reasonable whether or not there existed a dispute over material facts.

The flaw in the circuit court's approach is apparent. If the jury's only role is to decide which of two conflicting versions of the facts is true, then excessive force cases would only be submitted to the jury on special interrogatories leaving the court to decided the ultimate question of reasonableness after the interrogatories have been answered. The court below does not suggest this absurd result. Nevertheless, that is where the reasoning leads us. In fact the circuit court's opinion merely serves to inch excessive force cases further away from the province of the jury. While this may be the intended result, it is

inconsistent with the basic function of Rule 56(c) and the Court's holding in *Anderson*.

II. The Circuit Court's ruling conflicts with decisions of other circuits

Although other circuit courts have applied standards that are seemingly consistent with that enunciated by the court below, others have not. None, however, have gone so far as to characterize the question of objective reasonableness as a purely legal question outside the context of qualified immunity. In any case, the circuits have varied in their responses to the issue. The issue has been most directly examined by Third Circuit. *Smith v. Marasco*, 318 F.3d 497 (3d Cir 2003); *Abraham v. Raso*, 183 F.3d 279 (3d Cir. 1999).

The *Abraham* court was forced to deal with this subject head on. In that case, an estate sued an arresting officer under Section 1983 for excessive force in firing at the decedent and killing him. *Abraham*, 183 F.3d at 283-85. The *Abraham* court struggled with the correct standard to apply on summary judgment when deciding, assuming a given set of facts, whether a use of force is objectively reasonable. *Abraham*, 183 F.3d at 290. Although the *Abraham* court refered to the question of reasonableness as a legal question, it still assumed that the question would normally be one for the jury. The court stated:

> "[R]egardless of whether objective reasonableness invokes a different and heightened standard from negligence, reasonableness under the Fourth Amendment

> should frequently remain a question for the jury. To put the matter more directly, since we lack a clearly defined rule for declaring when conduct is unreasonable in a specific context, we rely on the consensus required by a jury decision to help ensure the ultimate legal judgment of "reasonableness" is itself reasonable and widely shared.

Abraham, 183 F.3d at 290. The court further stated that "even though reasonableness traditionally is a question of *fact* for the jury, defendants can still win on summary judgment if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's conduct was objectively reasonable." *Id.* (*quoting Scott v. Heinrich,* 39 F.3d 912 (9th Cir. 1994)).

The *Abraham* court ultimately reversed the district court's grant of summary judgment. In part, however, this was due to the court's finding that there were disputed facts relevant to the question of the threat that decedent posed to others. *Id.* Nevertheless, while the court found that there were some facts in dispute, it still considered whether summary judgement would be appropriate based on the undisputed facts. *Id.* at 293. The court reasoned that even based on the undisputed facts, a *jury* could reasonably conclude that the decedent did not pose a sufficient threat to justify the use of deadly force. *Id.*

Notably, the court also recognized the danger of situations where the victim of deadly force is unable to testify. The court explained that it "may not simply accept what may be

a self serving account by the officer. It must look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational fact finder that the officer acted unreasonably." *Id.* at 294. (*quoting Scott,* at 915). Thus, while not properly articulating the precise standard that this Court set forth in *Anderson*, the *Abraham* court nonetheless seems to have applied it to the undisputed facts before it.

Part of the confusion inherent in *Abraham* is a result of the Ninth Circuit's opinion in *Scott*, in which summary judgment was granted to defendants based on qualified immunity. *Scott,* 39 F.3d 912. As part of its qualified immunity analysis, the court considered whether the use of force at issue was objectively reasonable. Despite it's reasoning that "reasonableness is traditionally a question of fact for the jury," the court held that summary judgment could still be granted by the district court as long as it resolves all questions in favor of the plaintiff. *Scott,* 39 F.3d at 915. Following *Scott,* the Ninth Circuit has ruled similarly in other cases examining the reasonableness of a use of force in the context of the qualified immunity analysis. *See Billington v. Smith,* 292 F.3d 1177 (9th Cir. 2001); *Jackson v. City of Bremerton,* 268 F.3d 646 (9th Cir. 2001). While these holdings seem to be consistent with the analysis of the court below, the relevance of these decisions is questionable given the distinction the Court has made between the ultimate question of objective reasonableness

under the Fourth Amendment and the threshold question of reasonableness under qualified immunity. *Saucier v. Katz,* 533 U.S. 194 (2001). Nevertheless, even if the question of objective reasonableness is analyzed the same way whether or not in the context of qualified immunity the Ninth Circuit opinions on this point do not go as far as the circuit court below. For example, neither *Scott,* nor *Jackson* , even address the standard by which a district court should make its own evaluation of reasonableness. They merely state that a court must resolve all factual disputes in favor of the plaintiff. *Scott,* 39 F.3d at 915; *Jackson,* 268 F.3d at 651. More importantly, in *Billington,* court implied that its decision was based, at east in part, on whether a jury could conclude that the officer's actions were unreasonable in light of other, more reasonable, alternatives. 292 F.3d at 1191.

The opinion below is also in conflict with the Eighth Circuit's analysis of objective reasonableness in the context of a motion for summary judgment. *See Wilson v. Spain,* 209 F.3d 713 (8th Cir. 2000). While *Wilson* also examined the question of qualified immunity prior to *Saucier,* it is instructive because it articulates a uniform standard for evaluating objective reasonableness in an excessive force case. *Wilson* involved the issue of reasonableness of a use of force during a post arrest booking. *Wilson,* 209 F3d at 714. After determining that the Fourth Amendment was the applicable constitutional protection, the court addressed the issue of whether the officer's

use of force was objectively reasonable, thereby entitling the defendants to summary judgment. *Id.* at 715-16. Although the court ultimately affirmed the district court's grant of summary judgment, it only did so after applying the proper standard. After analyzing the undisputed facts, the court held that "a reasonable jury could not conclude" that the officer's use of force was objectively unreasonable. *Id.* at 717. Thus, the *Wilson* court properly applied the standard articulated in *Anderson.*

The decision below is also in conflict with circuits that have addressed the issue of objective reasonableness in the context of a motion for directed verdict. Because the Court has held that the standard for summary judgment mirrors that for directed verdict, *(Anderson,* 477 U.S. at 250), the applicable standards for evaluating each should, accordingly, be the same in excessive force cases. Here, the appellate court placed a tremendous amount of stock in its conclusion that the lack of disputed material facts somehow transformed the issue into a pure question of law. Even in the context of undisputed material facts at trial, however, the question remains one in which the facts must be examined through the eyes of a reasonable jury. Again, the Eighth Circuit has supplied the proper analysis. *Gardner v. Buerger,* 82 F.3d 248 (8th Cir. 1996); *See also Ikerd v. Blair,* 101 F.3d 430 (5th Cir. 1996).

Gardner involved a claim that the defendant officer had exercised an unreasonable use of deadly force while serving an

order of protection on plaintiff's decedent. *Id.* at 250. The *Gardner* decision is particularly relevant to this case because, although it addressed the issue of reasonableness in the context of a motion for judgment as a matter of law at trial, the evidence at issue was undisputed. *Id.* In fact, the plaintiff's case relied on the jury crediting the defendant's testimony. *Id.* at 252. Plaintiff presented no evidence concerning what went on inside decedent's home at the time of the shooting. *Id.* Although plaintiff did present evidence that the decedent was shot in the back of the head, this evidence was uncontradicted. *Id.* 253.

The district court in *Gardner* granted judgment as a matter of law reasoning that there was insufficient evidence of excessive force. *Id.* at 251. The Eighth Circuit reversed. *Id.* Beginning with the *Graham* analysis as the proper substantive law, the court then applied the appropriate standard for evaluating defendants motion for judgment as a matter of law. *Id.* at 252. The court concluded that, based on the undisputed facts, a *reasonable jury* could conclude that the defendant had used excessive force. *Id.* (emphasis added). *Gardner* unequivocally stands for the proposition that question objective reasonableness in an excessive force case is one for the jury, even in the face of undisputed facts.

The circuits have employed a variety of methods of dealing with the question of objective reasonableness on motions for summary judgment. The multiple nuances

employed when courts determine that there are no disputed material facts are reason enough for this court to grant this writ. More important, however, is the degree to which these varied approaches strain logic. In granting this writ, the Court will have the opportunity to set forth a logical and uniform approach to this issue that is consistent with, and builds upon, the Court's jurisprudence.

III. The Court should take this opportunity to render a universal standard for evaluating objective reasonableness

The confusion exhibited in the circuits illustrates an additional reason why this court should grant Petitioner's writ. In *Saucier*, this Court held that the initial question of reasonableness of an officer's conduct was the threshold question to consider when a defendant asserts the qualified immunity defense. 533 U.S. at 201. The Court did not, however, address the threshold question of whether a constitutional violation occurred. Instead it assumed one could have occurred based on the general rule prohibiting excessive force. *Saucier,* 533 U.S. at 207. Addressing this important issue will both clarify the law concerning the analysis of reasonableness in excessive force cases, and allow the Court to prevent the further erosion of a Plaintiff's basic right to a trial by jury on this question. The way the law is currently being applied to qualified immunity has the potential to completely swallow even the fact finding function of the jury at any stage

of litigation.

In *Saucier*, the Court reiterated that qualified immunity should be addressed at the earliest possible stage of the litigation. 533 U.S. at 201. To that end, the Court articulated the proper standard of the threshold inquiry: "Taken in the light most favorable to the party asserting the injury, do the facts *alleged* show the officer's conduct violated a constitutional right?" *Id.* (emphasis added). "If no constitutional right would have been violated were the *allegations* established, there is no necessity for further inquiries concerning qualified immunity." *Id.* (emphasis added). As stated, the qualified immunity analysis considers allegations, presumably those made in a Complaint. Thus, the standard articulated by the Court logically mirrors that of a motion to dismiss.

The standard is more difficult to apply, however, once the summary judgment stage is reached. At that point, a more detailed evaluation of facts is required. Additionally, as this court has stated in *Anderson,* a fair consideration of how those facts might be viewed by a jury is also required. 477 U.S. at 252. Without any further clarification of the procedural process for assessing the question on summary judgment, some courts will continue to treat the issue as a purely legal question, which the court can determine as it sees fit at any stage before, during, or after trial. *See Medina v. Cram,* 252 F.3d 1124 (10th Cir. 2001). This allows for courts, if they are so inclined, to decide the merits of excessive force cases at any time during the

pendency of the case by simply relying on the "legal question" of qualified immunity. Petitioner would propose that the court reiterate the standard for evaluating facts on summary judgment, with due regard to the reasonable possibilities at trial, and hold that same standard applies to the threshold question of reasonableness in excessive force cases.

CONCLUSION

The Court should grant this Writ in order to reassert the applicability of its holdings to motions for summary judgment. The varying methods that the lower courts have employed in addressing this question illustrate the need for the Court to make explicit its standards. Granting this Writ will allow the Court to set forth a unified standard for evaluating the objective reasonableness of conduct in excessive force cases. This will serve to protect the rights of litigants and the sanctity of a uniform judicial process. Petitioners, therefore, respectfully request that this Court grant this Writ.

Respectfully Submitted,

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 02-2262

DOUGLAS A. BELL and TAMMY BELL,

Plaintiffs-Appellants,

v.

MIKE IRWIN and STEVEN CROW,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 00-cv-4078-JPG—**J. Phil Gilbert**, *Judge*.

ARGUED JANUARY 29, 2003—DECIDED FEBRUARY 25, 2003

Before COFFEY, EASTERBROOK, and KANNE, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. After a bout of drinking, Douglas Bell threatened his wife Tammy, who phoned the police for protection. By the time an officer arrived, the couple had made up and asked to be left alone. Forty minutes later, however, one of the neighbors called to tell the police that Tammy had been knocking on doors in search of safety. An officer quickly returned and found Tammy down the street; she asked for help and said that Douglas had "torn up" the couple's home. Douglas refused to admit the officer (or to come out) for discussion. The officer called the local police chief and initiated a

background check, which revealed that Douglas had a history of arrests for domestic violence, unlawful use of weapons, obstruction of justice, and drunk driving; Tammy told the officers that Douglas had attempted suicide. The police chief could not get Douglas to come out but did see through a window that he was holding several knives and a meat cleaver. Douglas drove one of the knives into a wall near the front door and threw several others into the yard in the direction of the police. He told the chief that he would kill any officer who entered and then kill himself; Douglas insisted that he had nothing left to live for, did not care about anyone else's life either, and would come out only "feet first."

Local police then called for help from the state police, which dispatched Lt. Steven Crow and Sgt. Mike Irwin. Negotiations continued to be unavailing, even after Douglas's father arrived and implored him to cooperate. Crow authorized Irwin to disable Douglas by firing bean-bag rounds from a shotgun if that proved to be necessary. Bean-bag rounds are designed to stun and inflict blunt trauma, knocking a person down but not penetrating the skin or damaging internal organs more severely than a kick or punch would. The record does not show just how dangerous bean-bag rounds can be, so it is hard to know whether they should be classified as "deadly force," see *Omdahl v. Lindholm*, 170 F.3d 730, 733 (7th Cir. 1999), but they are less lethal than bullets or buckshot. (With defendants' acquiescence, the district court treated them as a species of deadly force; we need not decide whether this is correct.)

Douglas opened the door and threatened to blow up his home using propane and kerosene in tanks immediately outside. Irwin saw Douglas lean toward a tank with what appeared to be a cigarette lighter; in response Irwin fired at Douglas's arm and torso. The first three rounds staggered but did not stop Douglas; a fourth brought him

down. Douglas was a moving target, and one round hit him in the head. Officers took him to the hospital; he arrived unconscious and was treated for injuries to the head and upper left arm. While Douglas was at the hospital, an Illinois State Police Crime Scene Investigator discovered a lighter on the ground outside the door of the home. One cannot be sure that it was in Douglas's hand when Irwin fired, but no other explanation for its presence has been adduced.

In this suit under 42 U.S.C. §1983, Douglas contends that he experienced a memory loss as a result of the beanbag impacts; Tammy seeks compensation for loss of consortium. The Bells' theory is that Irwin violated the fourth amendment by using force that was excessive under the circumstances, and that Crow is culpable for failing to prevent Irwin from doing this. The constitutional inquiry is objective. See *Graham v. Connor*, 490 U.S. 386, 397 (1989); *Lester v. Chicago*, 830 F.2d 706 (7th Cir. 1987). And it is implemented "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. Police may use even deadly force if "the suspect poses a threat of serious physical harm, either to the officer or to others". *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). "[I]f the suspect threatens the officer with a weapon" (*ibid.*) that risk has been established. See also *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988) (en banc); *Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1988) (en banc). Applying these principles to the evidence in this record, the district court granted summary judgment to the defendants.

Douglas acknowledges that he was armed with knives, drove Tammy out of their home, refused to emerge or admit police for discussion, held a knife to his throat while threatening suicide, and made a move toward the propane tank. He denies making explicit threats to kill the officers or ignite the propane—but he concedes that the

combination of drink and concussion has dimmed his memory of what occurred that evening. The district judge thought that, even resolving all factual disputes in plaintiffs' favor, what remains is enough to show that it was reasonable to use force to end the confrontation and avoid any risk that Douglas would injure himself or others. Like the district judge, we think that Douglas should have thanked rather than sued the officers. True, he suffered injury at their hands, but in his depressed and irrational state, aggravated by liquor, he might have done himself or others greater injury had they not intervened. It is easy in retrospect to say that officers should have waited, or should have used some other maneuver—these propositions cannot be falsified—but *Graham* makes it clear that the fourth amendment does not require second-guessing if a reasonable officer making decisions under uncertainty and the press of time would have perceived a need to act. The risks of intervention, unfortunately realized when one round hit Douglas in the head, still seem less than the risks of doing nothing. See also, e.g., *Pena v. Leombruni*, 200 F.3d 1031 (7th Cir. 1999).

The Bells' principal theme on appeal is that, however these things may appear to the police and federal judges, only a jury is empowered to determine whether the officers' conduct was reasonable. Plaintiffs seek to equate constitutional-tort litigation to common-law tort litigation, in which negligence is a matter of degree to be resolved by a jury even if all of the facts have been stipulated, provided that a reasonable argument may be made both for or against the view that the defendant was negligent. Here is where the phrase "constitutional tort" may mislead, for the Constitution is not a form of tort law. It creates legal rules. Permitting the jury freedom to determine for itself whether particular conduct was reasonable within the meaning of the fourth amendment would

introduce the *ex post* reassessment that *Graham* decried. Under the Constitution, the right question is how things appeared to objectively reasonable officers at the time of the events, *not* how they appear in the courtroom to a cross-section of the civilian community. *Ornelas v. United States*, 517 U.S. 690 (1996), holds that whether a search or seizure (other than one authorized by a warrant) is supported by probable cause is a question of law for the court of appeals, so that even the district judge's view receives no deference. The Justices distinguished the rules for ascertaining historical facts from the role of the appellate tribunal in applying principles of constitutional law to those facts. See also *Miller v. Fenton*, 474 U.S. 104 (1985) (same allocation for the question whether a confession is involuntary).

When material facts are in dispute, then the case must go to a jury, whether the argument is that the police acted unreasonably because they lacked probable cause, or that they acted unreasonably because they responded overzealously and with too little concern for safety. But when material facts (or enough of them to justify the conduct objectively) are undisputed, then there would be nothing for a jury to do *except* second-guess the officers, which *Graham* held must be prevented. Since *Graham* we have regularly treated the reasonableness of force as a legal issue, rather than an analog of civil negligence. See, e.g., *Smith v. Ball State University*, 295 F.3d 763, 770-71 (7th Cir. 2002); *Smith v. Chicago*, 242 F.3d 737, 743-44 (7th Cir. 2001); *Hebron v. Touhy*, 18 F.3d 421 (7th Cir. 1994); *Titran v. Ackman*, 893 F.2d 145 (7th Cir. 1990). This appears to be the accepted rule; the Bells do not cite, and we could not find, any post-*Graham* appellate opinion holding that the reasonableness of using force is a jury question even if no factual disputes require resolution. To the extent that *Llaguno v. Mingey*, 763 F.2d 1560, 1565 (7th Cir. 1985) (en banc), treated probable cause and deriva-

tively the reasonableness of police officers' conduct as matters indistinguishable from negligence in ordinary tort suits, it has been superseded by *Graham* and *Ornelas*, which stress that reasonableness is analyzed objectively, and as a matter of law. Judges rather than juries determine what limits the Constitution places on official conduct.

To say that police officers have acted within the bounds that the Constitution sets is not necessarily to say that they have acted wisely. States may choose to afford additional protections of personal safety and require the police to wait even when federal law permits them to act. If states create negligence-like rules, then by virtue of the seventh amendment they will be implemented by juries if the litigation occurs in federal court. When this case began, it included a state-law claim under the supplemental jurisdiction. But that claim has been abandoned, and there is no material dispute of fact that calls for a trial of the federal theory.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DOUGLAS A. BELL
and TAMMY BELL,

Plaintiffs,

v.

Clerk
MASTER SERGEANT
MIKE IRWIN and LIEUTENANT
STEVEN CROW,

Defendants.

Case No. 00-cv-4078-JPG

FILED
02May-3 PM 2:40

U.S. DISTRICT COURT
SOUTHERN DISTRICT
IL, BENTON OFFICE

MEMORANDUM AND ORDER

This matter comes before the Court on the motions for summary judgment filed by defendants Master Sergeant Mike Irwin ("Irwin") (Doc. 106) and Lieutenant Steven Crow ("Crow") (Doc. 115). Plaintiffs Douglas Bell ("Mr. Bell") and Tammy Bell ("Mrs. Bell") (collectively, "the Bells") responded to the motions (Docs. 108 & 119), and Irwin and Crow replied respectively (Docs. 109 & 120).

I. Background

This § 1983 action stems from an April 2,1999, incident in which Mr. Bell was arrested by Crow and Irwin, who are officers of the Illinois State Police. The Bells allege that in the course of the arrest Irwin fired four bean-bag rounds from a 12-gauge shotgun at point blank range at Mr. Bell's head when Mr. Bell posed no threat to anyone. The Bells claim that the use of

such force in Mr. Bell's arrest was excessive and therefore violated Mr. Bell's rights under the Fourth Amendment. The Bells allege that Crow authorized Irwin to use such force, which the Bells allege is known to be lethal, without giving proper instruction about the circumstances in which it should be used. They also allege that Crow failed to intervene and prevent Irwin's use of excessive force once he became aware that it was being used. Mrs. Bell claims that as a result of the defendants' battery of her husband, she has suffered a loss of his love, society, affection and consortium.

Irwin and Crow now ask the Court to grant summary judgment in their favor based on the merits of the case and on qualified immunity grounds.

II. Summary Judgment Standard

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Spath v. Hayes Wheels Int'l-Ind., Inc.,* 211 F.3d 392, 396 (7th Cir. 2000). The reviewing court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, *255* (1986); *Spath,* 211 F.3d at 396. Where the moving party fails to meet its strict burden of

proof, a court cannot enter summary judgment for the moving party even if the opposing party fails to present relevant evidence in response to the motion. *Cooper v. Lane,* 969 F.2d 368, 371 (7th Cir. 1992).

In responding to a summary judgment motion, the nonmoving party may not simply rest upon the allegations contained in the pleadings but must present specific facts to show that a genuine issue of material fact exists. Fed. R. Civ. P. *56(e); Celotex,* 477 U.S. at 322-26; *Johnson v. City of Fort Wayne,* 91 F.3d 922, 931(7th Cir. 1996). A genuine issue of material fact is not demonstrated by the mere existence of "some alleged factual dispute between the parties," *Anderson,* 477 U.S. at 247, or by "some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986); *Michas v. Health Cost Controls of Ill., Inc.,* 209 F.3d 687, 692 (7th Cir. 2000). Rather, a genuine issue of material fact
exists only if "a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Anderson,* 477 U.S. at 252; *accord Michas,* 209 F.3d at 692.

III. Facts

Viewed in the light most favorable to the Bells, the evidence establishes the following relevant facts.[1] In April 1999, the Bells lived in a trailer in Eldorado, Illinois. Late at night on April 1, 1999, Eldorado police officer James Johnson ("Johnson") was dispatched to the Bells' home in relation to a domestic disturbance between Mr. and Mrs. Bell. Johnson saw that the Bells were intoxicated and determined that the Bells had, in fact, been arguing. However, both of them told Johnson that they did not want anyone arrested, so Johnson returned to his regular patrol duties.

Less than an hour later, now into the morning of April 2, 1999, Johnson was again called to the Bells' home. He found Mrs. Bell outside and down the street from the Bells' trailer. She told him that Mr. Bell had "torn up" the trailer and was breaking dishes, and she asked for Johnson's help with Mr. Bell, who was still inside the trailer. Johnson knocked on the trailer door, but Mr. Bell refused to open the door. When Johnson asked Mr. Bell to come out of the trailer, he responded

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[1]"The Court notes that the defendants cite to non-existent or incorrect exhibits on occasion. For example, Irwin cites to Exhibit E-2, which does not exist, and Exhibit U, which does not contain anything relating to the facts for which it was cited. The Court has disregarded the alleged facts to the extent that they are not supported by the evidence. Curiously, the plaintiffs fail to cite any evidence in support of their assertions that facts are "disputed."

with profanity. Johnson then looked through the trailer door and saw Mr. Bell sitting on a couch with a large knife partially concealed under his leg. Seeing that a weapon was involved in the situation, Johnson called for back up from the Eldorado Police Department.

Police Chief Anthony Lloyd ("Lloyd") arrived on the scene and Johnson briefed him on what had occurred so far that night. Lloyd knew that Mr. Bell had been cited in the past for driving under the influence, and Mrs. Bell told him that Mr. Bell had had personal problems and had attempted suicide twice in the past. After conferring with Johnson and Mrs. Bell, Lloyd talked to Mr. Bell and got him to open the door of the trailer. At that point, Mr. Bell, who still appeared to be intoxicated, was holding several knives and a can of beer in his hands and had several knives in a back pocket. Mr. Bell then put one of the knives he was holding into his pocket and picked up a meat cleaver. He told Lloyd that he had been having problems with his wife and appeared despondent. When Lloyd refused Mr. Bell's invitation to come inside the trailer, Mr. Bell stabbed one of the knives into the inside wall of the trailer beside the doorway and threw the meat cleaver into the ground in front of the trailer. Mr. Bell again refused to come out of the trailer and closed the door. A moment later, he opened the door again and resumed his conversation with Lloyd. A few minutes later, Lloyd asked for back up from the Illinois State Police and then

continued to talk to Mr. Bell. A state police officer on the scene called his commander.

Lloyd continued to talk to Mr. Bell while the Illinois State Police was on its way there. Mr. Bell was still despondent. He told Lloyd he was not coming out of the trailer unless it was "feet first" and that he would kill any officer that tried to come in to get him, then would kill himself Mr. Bell's father arrived on the scene, and he and Mr. Bell got into a heated argument. At that point, Mr. Bell threatened to "cut" Lloyd if he did not back up from where he was talking to Mr. Bell.

Crow was called to the scene. Before he arrived, a state police officer on the scene told Crow of Mr. Bell's criminal history, which included arrests for obstruction of justice, domestic violence and driving under the influence. He also told Crow that Mr. Bell had threatened officers on the scene. Crow then told the state police officer to "contain the situation, establish a perimeter, and evacuate all the neighbors who would be in jeopardy if [Mr. Bell] came out and we had to engage him" and called for the tactical response team. Crow also learned from a criminal history check that Mr. Bell had been arrested previously for unlawful use of a weapon and obstruction of justice.

When Crow arrived on the scene, he saw Mr. Bell with a knife in the doorway of his trailer talking to Lloyd and Mr. Bell's father. Mr. Bell would periodically poke the knife at his own throat or wave it at Lloyd. He also said that he had nothing

to live for and that if anyone tried to take him out of the trailer he would hurt them. Lloyd and a state police officer briefed Crow on the night's events, including their information that Mr. Bell had attempted suicides in the past and was threatening officers that night.

Irwin, the leader of the tactical response team, arrived on the scene a short while later, and Crow briefed him on the situation and Mr. Bell's background. Irwin and J.J. Wittenborn ("Wittenborn"), the assistant team leader, were armed with 12 gauge shotguns loaded with bean bag rounds, which they told Crow, the officer in charge of the scene. Bean bags rounds are "specialty impact munitions" designed to cause blunt trauma without penetration of the human body. Team members are trained and tested four times a year on the use of bean bag rounds. Crow was familiar with the capacity of the bean bag rounds with which Irwin and Wittenborn were armed. He authorized Irwin and Wittenborn to fire the bean bag rounds if Mr. Bell became threatening, but gave no more specific instructions about the use of the bean bag rounds.

After the tactical response team arrived, Mr. Bell appeared in the trailer door and began talking with Crow. Mr. Bell again announced that anyone who tried to get him out of the trailer would get hurt and that he would only leave the trailer "feet first." At various points in the conversation, Mr. Bell held a paring knife, a large two-pronged fork and other items capable of cutting or stabbing. Crow

eventually moved closer to the trailer door so Mr. Bell could see him better. At this point, Irwin was to Crow's immediate right and was helping him think of things to say to Mr. Bell.

Mr. Bell eventually emerged from the trailer and sat on the steps leading to the trailer door. He asked Crow to come closer to him, but again warned that if Crow tried to rush him, someone would get hurt. Mr. Bell retreated into the doorway again and complained to Crow about what Mrs. Bell had done to his trailer and how she had injured him. He also said that he was going to blow up the place and that he had enough kerosene, propane and everything else he needed to do so. Mr. Bell then pointed to propane tanks at the end of his trailer. There was also a propane tank near the trailer door and a blue kerosene can under the trailer steps, and Mr. Bell had a lighter in his hand. Mr. Bell went back inside his trailer and reappeared in the doorway a short while later.

Crow moved closer to Mr. Bell to try to shine a flashlight into the trailer to see the damage that Mr. Bell said Mrs. Bell had done. Within seconds, Irwin saw Mr. Bell quickly put one foot on the trailer step and lean forward with his left arm extended toward the kerosene can under the steps. Mr. Bell still had the lighter in his hand and Irwin believed that Mr. Bell had the capacity to, within seconds, ignite or blow up the entire trailer using the propane with which he heated the trailer or cooked his meals. Based on Mr. Bell's aggressive and hostile demeanor that night, his apparent unwillingness to cooperate

with Lloyd or Crow by coming out of the trailer voluntarily, his criminal history and his announced lack of concern for the safety others, Irwin thought this was a serious possibility. Without any warning, beginning from behind and to the right of Crow, Irwin fired four bean bag shots in quick succession while walking rapidly past Crow toward Mr. Bell. Irwin aimed at Mr. Bell's left arm and chest but also hit him in the head, causing him to fall backward into the trailer. Specifically, Irwin fired the first shot from approximately twelve feet. The shot hit Mr. Bell in the chest and caused him to flinch. Keeping an eye on Mr. Bell, Irwin then began moving forward and fired the second shot from approximately ten feet. The second shot also hit Mr. Bell in the chest and caused him to stagger but not to collapse. Continuing to move toward Mr. Bell, Irwin fired a third shot from approximately eight feet. The third shot hit Mr. Bell in the head and caused him to bend forward and stagger backwards into the trailer. Irwin fired the fourth and final shot from approximately eight feet and hit Mr. Bell in the arm. This shot finally caused Mr. Bell to fall down. Irwin fired the shots at about one-second intervals. He believed four shots were necessary to incapacitate Mr. Bell thoroughly and prevent him from causing a fire or explosion or from using a knife to injure a police officer. Irwin also believed that the use of deadly force would have been appropriate in that situation because Mr. Bell had threatened to blow up his trailer and to seriously injure or kill other people.

After firing the four bean bag rounds, Irwin dropped his shotgun and entered the trailer where he grabbed Mr. Bell by the arm. The team took Mr. Bell into custody, removed him from the trailer and began giving him first aid. Soon thereafter Mr. Bell was taken to the emergency room for treatment of his injuries. When he arrived at the hospital, Mr. Bell was unconscious and bleeding from the head and left upper arm. He had a one inch by one inch hole in his upper left arm where a bean bag was embedded. Mr. Bell has experienced a loss of memory since the incident.

IV. Analysis

A. Count I: Mr. Bell's Claim Against Irwin

Irwin is entitled to summary judgment on Count I on two alternate grounds.

1. Merits

Irwin is entitled to summary judgment on Count I because he has shown that the Bells cannot prove their claim that he used excessive force in arresting Mr. Bell.

"*[A]ll* claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest. . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor,* 490 U.S. 386, 395 (1989) (emphasis in original); *see Tennessee v. Garner,* 471

U.S. 1, 7-8 (1985).[2] "Determining whether the force used to effect [an arrest] is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham,* 490 U.S. at 396 (quoting *Garner,* 471 U.S. at 8 (further internal quotations omitted). The "reasonableness standard" cannot be precisely defined or mechanicallyapplied. *Graham,* 490 U.S. at 396. On the contrary, it turns on the totality of the circumstances of each particular case including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham,* 490 U.S. at 396. The determination must also consider "that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." *Graham,* 490 U.S. at 396-97.

The "reasonableness" standard is objective. *Graham,* 490 U.S. at 397. Whether a use of force is reasonable "must be

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[2]The Fourth Amendment provides that the "right of the people to be secure in their persons. . . against unreasonable . . . seizures [of the person] shall not be violated." U.S. Const. amend. IV.

judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and must turn on "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham,* 490 U.S. at 396, 397; *see Saucier v. Katz,* 533 U.S. 194, 206 (2001).

Mr. Bell claims that Irwin used excessive force when he fired the four bean bag rounds at him. Irwin claims that under the circumstances as they were known to him at the time, a reasonable officer would have responded just as he did and that therefore his conduct was not unreasonable. Mr. Bell offers no evidence to contradict the evidence establishing facts as set forth by Irwin. Instead, he merely labels the "facts" alleged by Irwin as "opinion" and "inference." This is not a sufficient response under Rule 56(e) to create an issue of fact. Mr. Bell also points, without citing any evidence, to his "serious head injuries" and argues that they weigh in favor of finding that the force Irwin used was excessive. Finally, he argues that reasonableness is a question that the jury should decide.

The Court finds that, even when the evidence is viewed in the light most favorable to Mr. Bell, no reasonable jury could find that Irwin's use of force was unreasonable and therefore excessive. Examining the totality of the circumstances in this case, the Court has no doubt that Irwin's conduct was eminently reasonable. Irwin knew that Mr. Bell was in an emotional state

that appeared to be exaggerated due to intoxication and that he had refused to cooperate with law enforcement officers that night. He also knew that Mr. Bell had tried to commit suicide in the past and that he had threatened to kill himself and others that night. Irwin he knew that Mr. Bell had knives, other sharp objects and explosive materials either in his grasp or within easy reach throughout the night. When Mr. Bell announced a specific plan to blow up his trailer - which could also seriously injure or kill others in the immediate area - and retreated into the trailer such that he could have begun to release propane or other explosive materials into his house, Irwin reasonably believed that Mr. Bell might be putting his plan into action behind closed doors. Then, when Mr. Bell made a furtive motion with a lighter in his hand toward what appeared to be a kerosene can in Irwin's plain view, Irwin stopped Mr. Bell by firing bean bag rounds aimed at his chestand arm. It took four rounds to bring Mr. Bell to the ground, and all of them were fired from at least eight feet away. Irwin, who was trained quarterly in the use of bean bag rounds, knew that they were not as dangerous as bullets, although he knew that they could seriously injure a person.

It is clear that any reasonable officer in Irwin's position would have believed that Mr. Bell, emotional and drunk, posed an immediate and serious, if not deadly, threat to himself, to the law enforcement officers surrounding the trailer and to others in the trailer park. A reasonable officer also would have been

justified in using force less potent than bullets, although still dangerous, to prevent Mr. Bell from causing a dangerous and deadly explosion.[3] This is especially true in light of the fact that Mr. Bell appeared to be taking concrete steps toward that end by reaching toward a kerosene can with a lighter in his hand. A reasonable officer would also have not hesitated to fire any number of bean bag rounds necessary to bring Mr. Bell to the ground and to prevent him from accessing any of the numerous weapons, explosive materials or ignition devices within his reach. That Mr. Bell was hit in the head by a bean bag that was aimed at his chest or arm does not, in retrospect, render Irwin's behavior unreasonable.

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[3]Whether the use of bean bag rounds constituted deadly force or some lesser level of force in this situation is not an issue of fact that would preclude summary judgment. *Compare Omdahl v. Lindholm,* 170 F.3d 730 (7th Cir. 1999) (no threat of harm to officers or others). Under the facts presented in this case, Irwin and any other reasonable officer would have had probable cause to believe that Mr. Bell posed an immediate threat of serious physical harm to Irwin, the other police officers and other residents of the trailer park. The Supreme Court has indicated that the use of deadly force is appropriate in such threatening situations. *See Tennessee v. Garner,* 471 U.S. 1, 11(1985). Therefore, the question of whether bean bags rounds are "deadly force" is not a material issue of fact in this case and does not preclude summary judgment.

The Court is convinced that Irwin's conduct was objectively reasonable and that no reasonable jury could find otherwise. Because there is no genuine issue of material fact regarding the reasonableness of Irwin's behavior, Irwin is entitled to summary judgment on Count I as a matter of law.

2. Qualified Immunity

Even if Irwin's conduct had been unconstitutional, he would be entitled to summary judgment because he is protected by the doctrine of qualified immunity.

Qualified immunity is an affirmative defense that shields government officials from liability for civil damages where their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982); *Denius v. Dunlap,* 209 F.3d 944, 950 (7th Cir. 2000). It applies only to state officials who occupy positions with discretionary or policymaking authority and who are acting in their official capacities. *Harlow,* 457 U.S. at 816; *Denius,* 209 F.3d at 950. A court required to rule upon the qualified immunity issue must first consider whether the facts alleged, taken in the light most favorable to the party asserting the injury, show that the officer's conduct violated a constitutional right. *Saucier v. Katz,* 533 U.S. 194, 201 (2001). Only after a court has determined that the plaintiff has alleged a constitutional violation, should a court pursue the question of qualified immunity *Id.*

If the plaintiff has alleged a constitutional violation, then the question is whether the right allegedly violated was clearly established at the relevant time. *Id.* "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.; see McNair v. Coffey,* 279 F.3d 463, 465 (7th Cir. 2002). "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Saucier,* 533 U.S. at 202. The plaintiff bears the burden of demonstrating that a constitutional right is clearly established. *Denius,* 209 F.3d at 950.

In this case, the key inquiry for the purpose of qualified immunity analysis is whether, in the particular situation confronted by Irwin, it would have been clear to a reasonable officer that Irwin's alleged conduct was unlawful. *See Saucier,* 533 U.S. at 202. The only Court of Appeals case to which Mr. Bell points, *Omdahl v. Lindholm,* 170 F.3d 730 (7th Cir. 1999), does not definitively answer that question. *Omdahl,* which was decided only eighteen days before Irwin fired bean bag rounds at Mr. Bell, involved the use of bean bag rounds against an individual who was threatening to commit suicide with a shotgun but expressed no intention to harm others. *Id.* at 731. An officer shot bean bag rounds at him while his gun was lowered, and then another officer shot him with a bullet in the face. *Id.* at 731-32. The District Court denied the officers' motion for summary judgment on qualified immunity grounds,

stating that there was an issue of fact as to the whether the officers used "deadly force." *Id.* at 732. In ruling on the officers' interlocutory appeal, the Court of Appeals held that it did not have jurisdiction to hear the interlocutory appeal because the appeal challenged the District Court's determination about whether there was an issue of fact, not its determination of a legal question. *Id.* at 733-34. This is a far cry from "clearly establishing" that theuse of bean bag rounds in a situation like the one in this case is excessive.

In fact, *Omdahl* and the case at bar differ in several respects. First, the facts as known to the officers involved are distinguishable. In *Omdahl,* the suspect was not aggressive toward others and had aimed his weapon away from anyone. Unlike the officers in *Omdahl,* Irwin was faced with an individual who was aggressive, had threatened others and was taking concrete steps to achieve his threats. *Omdahl* is not a case with clearly analogous facts that would have enlightened a reasonable officer in Irwin's position as to the level of force he could constitutionally use.

Second, the Court of Appeals in *Omdahl* made no decision about whether bean bag rounds are deadly force and therefore subject to the clearly established restrictions on the use of deadly force. *See Tennessee v. Garner,* 471 U.S. 1, 11(1985) (holding that deadly force is constitutional where an officer has probable cause to believe a suspect poses a threat of serious physical harm to the officer or to others). On the

contrary, the Court of Appeals merely decided that it lacked the authority to make *any* decision on the appeal as it was presented to them. No reasonable officer would take the *Omdahl* decision to mean anything definitive about when bean bag rounds, whether deadly or not, are appropriate

In sum, *Omdahl* does nothing to enlighten a reasonable officer about whether he can constitutionally use bean bag rounds in a situation like that faced by Irwin. The only other case cited by Mr. Bell is a district court case that has nothing to do with bean bag rounds and was decided almost two years after Mr. Bell's apprehension. *Robinson v. City of Harvey,* Case No. 99 C 3696, 2001 WL 138901 (N.D. Ill. Feb. 16, 2001). Additionally, a district court case alone cannot "clearly establish" a right for qualified immunity purposes *Anderson v. Romero,* 72 F.3d 518, 525 (7th Cir. 1995). For these reasons, the Court finds that Mr. Bell has not demonstrated that his Fourth Amendment right in the case at bar was clearly established on April 2, 1999. Therefore, Irwin is entitled to qualified immunity on Count I.

For the foregoing reasons, the Court will grant Irwin's motion for summary judgment on Count I.

B. Count II: Mr. Bell's Claim Against Crow

Crow is entitled to summary judgment on Count II because there was no unconstitutional use of force.

Mr. Bell alleges that Crow violated his Fourth Amendment rights by failing to instruct Irwin properly in the

use of deadly force and by failing to intervene to prevent Irwin's use of excessive force toward Mr. Bell. The Court need not spend a great deal of time on Mr. Bell's claims against Crow because those claims fall along with his claims against Irwin.

Mr. Bell relies on two theories of liability. The first theory is that a supervisor may be liable because he exhibits deliberate indifference to the danger posed by an armed officer when the supervisor fails to instruct that officer that he is not to use deadly force except to prevent a killing or the infliction of other great bodily harm. *See Pena v. Leombruni,* 200 F.3d 1031, 1033 (7th Cir. 1999) (citing *City of Canton v. Harris,* 489 U.S. 378, 390 n. 10, (1989)), *cert. denied,* 530 U.S. 1208 (2000). The second theory is that a supervisor may also be liable because he has reason to know that a subordinate officer is using excessive force, he has a realistic opportunity to intervene to prevent the harm and he fails to do so. *Lan igan v. Village of E. Hazel Crest,* 110 F.3d 467, 477 (7th Cir. 1997); *Yang v. Hardin,* 37 F.3d 282, 285 (7th Cir. 1994). Both theories, however, can only succeed if the subordinate armed officer committed a constitutional violation. A defendant cannot be liable for failing to prevent a constitutional violation where the plaintiff cannot prove that underlying violation. *See Chavez v. Illinois State Police,* 251 F.3d 612, 652 (7th Cir. 2001); *Gossmeyer v. McDonald,* 128 F.3d 481, 494 (7th Cir. 1997).

Thus, Crow's liability for failing to adequately instruct Irwin or for failing to intervene to prevent Irwin from firing bean bag rounds depends on Irwin's liability for having used excessive force. Because the Court has determined that Irwin committed no constitutional violation when he fired the bean bag rounds at Mr. Bell, Crow cannot be liable for failing to instruct or intervene. Accordingly, the Court will grant Crow's motion for summary judgment.

C. Counts III & IV: Mrs. Bell's Claims

Irwin and Crow urge the Court to decline, pursuant to 28 U.S.C. § 1367(c)(3), to exercise supplemental jurisdiction over Mrs. Bell's state law claims against them for loss of consortium. Mrs. Bell argues that the Court should exercise supplemental jurisdiction because she believes summary judgment on her husband's claims is not warranted.

Section 1 367(c)(3) provides that a district court "may decline to exercise supplemental jurisdiction . . . if . . .the district court has dismissed all claims over which it has original jurisdiction." In deciding whether to retain or decline jurisdiction over state law claims when no original jurisdiction claims remain pending, a district court should consider judicial economy, convenience, fairness and comity. *Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1251 (7th Cir. 1994) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)).

The Court is granting summary judgment on Counts I and II, the only claims in this case over which it has original

jurisdiction. Therefore, under §1367(c)(3), the Court has discretion to exercise supplemental jurisdiction over Counts III and IV. The Court has considered the relevant factors and finds that it is appropriate not to exercise such jurisdiction. The Court firmly believes that Illinois state courts are far better equipped to hear cases that turn on the interpretation and application of state law between citizens of Illinois. As a matter of comity and efficiency, the privilege of hearing such cases should rest with the state court system. Furthermore, it would be no less convenient for Mrs. Bell to proceed in state court than in federal court, and she has not pointed to any unfairness that would result from litigation in a state forum. For these reasons, the Court declines to exercise jurisdiction over Mrs. Bell's claims and will dismiss those claims without prejudice for lack of subject matter jurisdiction pursuant to 28 U.S.C.§ 1367(c)(3).

V. Conclusion

For the foregoing reasons, the Court hereby

- **GRANTS** Irwin's motion for summary judgment (Doc. 106), **GRANTS** summary judgment on Count I in favor of Irwin and against Mr. Bell and **DISMISSES without prejudice for lack of subject matter jurisdiction** Mrs. Bell's claim in Count III against Irwin;
- **GRANTS** Crow's motion for summary judgment **(Doc. 115), GRANTS** summary judgment on Count II in favor of Crow and against Mr. Bell and **DISMISSES without**

prejudice for lack of subject matter jurisdiction Mrs. Bell's claim in Count IV against Irwin;

- **DIRECTS** the Clerk of Court to enter judgment accordingly.

IT IS SO ORDERED.

DATED: May 3, 2002

"s/_____"

J. PHIL GILBERT
DISTRICT JUDGE